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Case No. 00-1301:

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JANE ROE, II

Petitioner,

vs.

AWARE WOMAN CENTER FOR CHOICE, INC., a Florida corporation, EDWARD W. WINDLE, JR., PATRICIA B. WINDLE, and WILLIAM P. EGHERMAN, MD.

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Eleventh Circuit

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI OF WILLIAM P. EGHERMAN, M.D.

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QUESTIONS PRESENTED

1. Does the issue: "Whether a Complaint, which fails to allege that the Defendants engaged in physical obstruction of a reproductive health facility with intent to interfere with persons attempting to gain entrance to or egress from that clinic with the express purpose of preventing such persons from obtaining or providing reproductive health services, states a cause of action under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248," constitute an issue of such imperative public importance as to justify the deviation from normal appellate practice as to require immediate determination by this Court?

2. Does the issue: "Whether the filing of a Notice of Appeal of an order granting a Motion to Dismiss without prejudice to amend convert the District Court's order into a Final Order which is amenable to appellate review," constitute an issue of such imperative public importance to justify the deviation from normal appellate practice as to require immediate determination by this Court?

3. Does the issue: "Whether a Plaintiff in a lawsuit brought pursuant to the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 can proceed anonymously," constitute an issue of such imperative public importance as to justify deviation from normal appellate practice as to require immediate determination by this Court?

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STATEMENT OF THE CASE

The instant action was initiated with the filing of a Complaint Seeking Damages and Other Relief Under the Freedom of Access to Clinic Entrances Act ("FACE") and Demand for Jury Trial (the "Complaint") which the Plaintiff, Jane Roe, II, filed in the United States District Court for the Middle District of Florida, Orlando Division, on or about July 9, 1999. Because the disposition of this claim at the District Court level was in the form of an order granting a Motion to Dismiss Without Prejudice, and an order denying the Plaintiff's Motion to Proceed Anonymously, all factual allegations contained within the original Complaint are accepted as true. This is for the limited purpose of responding to Jane Roe's Petition for Writ of Certiorari to this Court, and does not constitute a waiver of any rights which William P. Egherman, M.D. ("Dr. Egherman") has to contest these factual allegations at a later time.

Dr. Egherman is filing the instant Opposition Brief to the Petition for Writ of Certiorari filed on behalf of Jane Roe, II, largely because of Dr. Egherman's obligations pursuant to Rule 15(2) of the Rules of the Supreme Court of the United States. This rule requires Dr. Egherman to refute the factual distortions which are contained within Ms. Roe's Petition at this time. These factual distortions are reflective of a pattern which counsel for Ms. Roe has followed throughout the course of this litigation. In fact, Dr. Egherman originally moved to strike Ms. Roe's original Complaint in light of the unsubstantiated and scandalous material which was contained within that document. The District Court denied as moot the Motion to Strike the Complaint, although it did admonish Ms. Roe: "to conform with Federal Rule of Procedure requiring Complaints to contain a short and *plain* statement of the claim." District Court order at page 12. (Emphasis in original).

The Complaint which Ms. Roe filed to initiate this claim accurately alleges that Aware Woman owns a reproductive health facility located at 1564 Dixie Way, in Melbourne, Florida. The Complaint further alleges that Ms. Roe entered the Aware Woman facility on March 29, 1997, for the purpose of obtaining reproductive health services in the form of an abortion. According to the Complaint, Ms. Roe was placed in the operating room where an ultrasound device was applied to assist Dr. Egherman in performing the procedure.

After the procedure was initiated, again according to the Complaint, Ms. Roe felt pain in her abdomen. At this time, Ms. Roe requested an ambulance to take her to an emergency room at a local hospital. Aware Woman's staff then allegedly held Ms. Roe on the operating room table while Dr. Egherman continued the abortion procedure. Ms. Roe alleges in her Complaint that she suffered a perforated uterus and a colon laceration as well as other physical and emotional pain and suffering as a result of this procedure. Based upon these allegations, Ms. Roe alleges in her Complaint that Aware Woman and the other Defendants to the lawsuit violated FACE by interfering, intimidating, and using a physical obstruction to restrain Ms. Roe and render impassable her desired egress from the facility.

Based upon these factual allegations, Dr. Egherman, as well as the other Defendants to this lawsuit, filed Motions to Dismiss. The basis of the Motion to Dismiss was the fact that Ms. Roe had failed to allege all of the requisite elements of a cause of action under FACE. Specifically, in order to state a cause of action under FACE, a plaintiff must allege the following three elements: 1) the defendant engaged in the physical obstruction of a reproductive health facility; 2) the defendant intended to interfere with or attempted to interfere with persons attempting to gain entrance to or egress from a reproductive health facility; 3) the intentional interference with persons entering or exiting the facility was done for the express

purpose of preventing such persons from obtaining or providing reproductive health services. ***United States v. Wilson***, 2 F.Supp.2d 1170, 1171 (E.D.Wis. 1998).

Accepting all of the well pled factual allegations of Ms. Roe's Complaint as true, Dr. Egherman argued, and the District Court agreed, that Ms. Roe's initial Complaint failed to state a cause of action under FACE. The Complaint's defect was that there was no allegation to satisfy the third element of the cause of action, namely that Dr. Egherman's actions were *motivated* by a desire to prevent Ms. Roe from obtaining reproductive health services. The District Court's order dismissing Ms. Roe's Complaint was entered without prejudice, allowing her a period of ten days in which to file an Amended Complaint. Rather than following this course, Ms. Roe instead elected to file a Notice of Appeal to the Eleventh Circuit Court of Appeals. This cause has been briefed at the Eleventh Circuit, and oral argument was heard on November 3, 2000. As of the date of this Opposition Brief, no ruling has been issued by the Eleventh Circuit in this case.

The foregoing is a plain statement of the facts reflecting the well pled allegations of Ms. Roe's Complaint, as well as the nature of the proceedings below. Unfortunately, contrary to the rules of this Court, but consistent with the manner in which this case has been prosecuted since its inception, Ms. Roe's Petition for Writ of Certiorari contains a number of scandalous and unsubstantiated allegations which are unsupported by anything within the record, and instead constitute mere opinions of Ms. Roe's counsel. As part of the background to this case, Ms. Roe has elected to characterize the reaction of local law enforcement officials to this Court's decision in ***Madsen v. Women's Health Center, Inc.***, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed. 2d 593 (1994). These references are absolutely irrelevant to the instant action, and constitute a deviation from the dictates of the Rules of the Supreme Court of the United States.

Ms. Roe goes on to state in her Petition that Aware Woman applied "assembly line procedure" after the ***Madsen*** decision, and that there were an increasing number of serious injuries to female patients. These statements are patently false, constitute yet another deviation from the rules of this Court, and warrant an order striking the unsupported and scandalous content.

Ms. Roe goes on to state in her background portion of her Petition for Writ of Certiorari that Dr. Egherman killed but did not remove the unborn child from Ms. Roe's body, and that the dead child was removed from her uterus at the emergency room subsequent to the abortion procedure. Again, there is absolutely nothing in the record to support these allegations. Instead, they simply constitute an effort by Ms. Roe and her counsel to inflame the passions of the reader, rather than seeking the objective legal review which this Court must perform.

ARGUMENT

Dr. Egherman opposes the legal arguments which Ms. Roe has presented to the trial court, to the Eleventh Circuit Court of Appeals, and to this Court, both on the issues raised in Dr. Egherman's Motion to Dismiss, and Ms. Roe's Motion to Proceed Anonymously. Specifically, Dr. Egherman believes that the District Court correctly determined that Ms. Roe failed to state a cause of action under FACE in her Complaint because she failed to allege that the Defendants' blocking of Ms. Roe's egress from the facility was motivated by a desire to prevent Ms. Roe from obtaining reproductive health services. A review of the Complaint demonstrates that there is no such allegation to support a claim that Dr. Egherman or any of the Defendants to the lawsuit had any such motivation. As such, Ms. Roe's Complaint fails as a matter of law.

Rather than taking advantage of the opportunity to amend her Complaint as was offered by the District Court, Ms. Roe chose instead to file a Notice of Appeal. The filing of this Notice of Appeal constituted a statement by Ms. Roe that she intends to stand on the allegations of her Complaint as they are currently worded. Otherwise, the appellate court would not have jurisdiction to review the decision of the District Court. Thus, a final decision on the merits of this cause must be made based on the language of the Complaint as it is currently worded.

Aware Woman also takes issue with the substantive legal arguments presented to the District Court, the Eleventh Circuit Court of Appeals, and to this Court, regarding Ms. Roe's ability to proceed anonymously. Although there is a right to privacy which protects those individuals who seek to exercise their freedom of choice by electing to seek reproductive health services through facilities such as Aware Woman, this does not automatically mean that a plaintiff who chooses to file a lawsuit against such a facility may abrogate the Constitution of the United States and the Federal Rules of Civil Procedure which create a strong presumption in favor of the disclosure of the

identity of the parties to a lawsuit. Ms. Roe bears an extraordinarily heavy burden in this regard, a burden which she failed to carry at the trial court level. The District Court did not abuse its discretion in denying Ms. Roe's Motion to Proceed Anonymously.

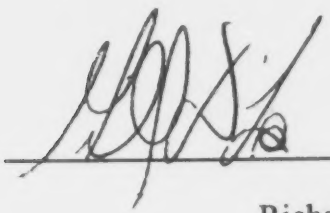
However, in spite of the substantive differences which Dr. Egherman has with the legal positions which Ms. Roe has taken throughout the course of this litigation, and in spite of the opposition which Dr. Egherman has expressed as to the superfluous and scandalous "factual" allegations contained within virtually every document Ms. Roe has filed in this litigation, Dr. Egherman does agree that the issues raised in this case are of such great public importance that it would be appropriate for this Court to grant Ms. Roe's Petition for Writ of Certiorari. By doing so, this Court would allow the parties to fully brief the substantive legal issues on the merits. Such a decision by this Court would allow this Court to definitively state the proper application of FACE, and specifically whether the act requires a plaintiff to allege motive on the part of the defendant to prevent an individual from obtaining reproductive health services as one of the elements in order to state a cause of action, as has been universally held by lower courts.

Granting Ms. Roe's Petition for Writ of Certiorari would also allow the parties to fully brief on the merits the issue of whether Ms. Roe should be allowed to proceed anonymously in this action. A decision to allow the parties to present this issue for this Court's review would allow this Court to formulate a coherent rule of law for litigants to follow, defining those rare exceptions to the general constitutional and procedural requirements that a party to a lawsuit identify herself at the lawsuit's inception. .

CONCLUSION

In spite of Dr. Egherman's opposition both to Ms. Roe's substantive legal arguments and to Ms. Roe's factual distortions which have been presented throughout the course of this litigation, Dr. Egherman does not oppose this Court's granting the relief which Ms. Roe has requested in her Petition for Writ of Certiorari, in order to allow the parties to this litigation to fully brief and argue all of the substantive issues on the merits.

Respectfully submitted,



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